

Model Surface Use and Mineral Development Accommodation Act

Source: Uniform Law Commissioners

It is possible for different interests in land to be held or owned by different persons. That is, the same visible geography may be subject to more than one kind of ownership interest. This is because American property law views interests in land as bundles of rights and obligations held by people against or on behalf of other people. Real estate law regulates relationships between people fundamentally, and the actual geography is simply the subject of those relationships.

One way to have different interests in different people in the same geography is to have ownership of the surface interests different from ownership of the mineral interests. What are surface interests? They are, generally, the right to occupy and use the surface of the land in any lawful way - to build on it the lawful structures that are permitted, to rent its occupation and use, and to sell the same, if that is what the surface owner wants to do.

The mineral interest is more confined. It is the right to remove valuable minerals that are found under the surface of the land. Implied in that right is the right to enter the geography on the surface and to use that surface in a manner consistent with the right to remove the minerals below the surface.

If there is a different owner for the surface interests and for the mineral interests, is there a potential conflict? Of course! The owner or holder of the mineral interests has the right to interfere with the surface interest to exercise the mineral interest. With some rare exceptions in the common law, the holder of the mineral interest does not have to compensate the holder of the surface interest for that interference.

In the United States today, there is considerable land, actual geography, for which the surface and mineral interests are held separately. As the demand for valuable and even semi-valuable minerals (gravel, for example, is a kind of mineral) increases, the potential for conflict increases and has increased.

In 1990, the Uniform Law Commissioners have promulgated the Model Surface Use and Mineral Development Accommodation Act (MSUMDAA) in an effort to resolve that conflict. It tries to resolve it by encouraging agreement and accommodation between the holders of the separate interests.

Both the holders of the surface interests and the mineral interests have the power to demand agreement and accommodation over the development of mineral interests. The mineral estate remains, as it is under the common law, the dominant estate. But the owner of the mineral interest can avoid

liability to the surface owner only by giving notice of proposed mineral development together with a plan to accommodate existing surface uses or improvements. The surface owner may object and subject the proposed development and the plan to a judicial proceeding. In the proceeding, if the court finds that mineral development is economically, technologically, and economically practicable, and that it cannot be conducted without injury to the surface use or improvement, or that the surface use or improvement interferes with sound practices of mineral development, then the mineral developer can proceed without any accommodation and without liability to the surface owner.

However, if the court finds no probability of mineral development, or that the surface use or improvement does not interfere with such development, then the mineral developer must accommodate the surface owner and may be liable for damages resulting from that development.

The surface owner also has the power to give notice to the mineral owner of any surface use or improvement that might need protection from mineral development. If the mineral owner does not object, there may be liability for injury from any future mineral development. If there is objection, the court follows the same pattern of findings described above.

MSUMDAA also determines the damages in the event there is liability for injury to the surface interests. The losses compensated are, generally, the economic losses suffered by the surface owner.

The conflicts between surface and mineral owners continue in a large part of the United States. MSUMDAA can resolve conflicts fairly and without halting necessary mineral development.

UNIFORM LAW COMMISSIONERS'
MODEL SURFACE USE AND
MINERAL DEVELOPMENT ACCOMMODATION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-NINTH YEAR
IN MILWAUKEE, WISCONSIN
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WITH PREFATORY NOTE AND COMMENTS

UNIFORM LAW COMMISSIONERS'
MODEL SURFACE USE AND
MINERAL DEVELOPMENT ACCOMMODATION ACT

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MODEL SURFACE USE AND MINERAL DEVELOPMENT ACCOMMODATION ACT

PREFATORY NOTE

This Model Act results from the existence in some parts of the United States of large areas where mineral estates were severed from surface estates but where no known mineral deposits exist or where there is little prospect that any known minerals will be developed. Because these severed mineral estates carry appurtenant easements of access through, and use of, the surface for mineral development purposes, the existence of the severed mineral estates can hinder development of the surface estates. Both surface owners and money lenders may be unwilling to risk capital to develop the surface where future mineral development could disturb the surface development. There are sufficient examples of a mineral previously thought to be of no value becoming valuable to make the risk sufficiently real that surface developers must take it into account.

An example of legislative recognition of the need to deal with this problem is the Texas Mineral Use of Subdivisions Act of 1983. (Tex. Nat. Res. Code ch. 92 (Supp. 1990)) The Texas act authorizes the Texas Railroad Commission to approve subdivision plats if the plats designate appropriate surface areas and easements for mineral development. Thereafter if the subdivision development goes forward, the mineral developer is limited to using the designated areas and easements. The purpose statement of the Texas act provides in part:

It is the finding of the legislature that the rapidly expanding population and development of the cities and towns of this state and the concomitant need for adequate and affordable housing and suitable job opportunities call for full and efficient utilization and development of all land resources of this state, as well as the full development of all the minerals of this state. (§ 92.001)

Other states have taken a different approach to surface development risks and have enacted statutes that, while not limiting the mineral developer's access, allow surface owners to collect damages for any surface interference or harm that results from mineral development. Those states and the year of adoption are as follows: Indiana, 1951; North Dakota, 1975 (coal); North Dakota, 1979; Montana, 1981; Oklahoma, 1982; South Dakota, 1982; West Virginia, 1983; Tennessee, 1984; and Illinois, 1988. However, except for the 1975 North Dakota act, these acts relate only to oil and gas development.

While the approach adopted in this Model Act is more general than the Texas approach, it does not adopt the approach of the other states either. Instead the Model Act: (1) recognizes the appurtenant easement; (2) adopts the accommodation doctrine as developed through common law decisions in several states for balancing the respective interests of surface and mineral estate owners (see Comment to Section 2); (3) provides mineral developers with an opportunity to get advance approval of mining plans as being in accord with the accommodation doctrine; (4) provides surface owners with an

opportunity to qualify some surface uses or improvements for damages from any interference by mineral development except during ongoing mineral development; (5) recognizes express expansions and limitations on the easement and the accommodation doctrine; (6) recognizes agreements relating to the duties and rights established under the Act; (7) prohibits injunctions and limits the damages recoverable for claims under the Act; and (8) specifies some procedures to be followed. Finally the Act is supplemental to the common law, equity, and other statutory rights and remedies.

MODEL SURFACE USE AND MINERAL DEVELOPMENT ACCOMMODATION ACT

SECTION 1. STATEMENT OF POLICY AND FINDINGS.

(a) The public policy of this State is to maximize the economic, cultural, and environmental welfare of the people by preserving all reasonable opportunities for optimum development and use of all surface and mineral resources. To that end, it is declared that where mineral estates are severed from surface estates by grant or reservation it is the public policy of this State to: (i) facilitate responsible development of surface and mineral estates by quantifying so far as practical the surface and mineral rights and burdens arising from the severance of the estates; (ii) encourage accommodation of potentially conflicting interests by agreement; and (iii) provide expeditious procedures for defining and quantifying rights and obligations of owners of severed estates whenever uncertainties exist and conflicts arise.

(b) The [legislative body of this State] finds that this public policy can be pursued without impairment of any constitutionally protected right of owners of severed estates through the exercise of the state's police power in the manner provided in this [Act].

(c) The [legislative body of this State] declares that the purpose of this [Act] is to provide damages as the sole remedy for violations of duties and obligations provided by this [Act] and not otherwise to limit or restrict the right of an owner of a severed mineral interest to engage in the development of minerals. This [Act] does not limit or restrict action upon or issuance of any permit, license, or approval required under other law for mineral development.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Accommodation" means the exercise of mineral development rights with due regard for the rights of the surface owner as to surface use and improvements, if technologically sound and economically practicable alternative methods of mineral development exist. "Accommodate" has a corresponding meaning.

(2) "Mineral" means gas, oil, coal, other gaseous, liquid and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical substance, gemstone, metallic, fissionable and nonfissionable ores, colloidal and other clay, steam and other geothermal resources, and any other substance defined as a mineral by any law of this State.

(3) "Mineral developer" means the owner of a severed mineral estate or any lessee or other person who has rights of mineral development.

(4) "Mineral development" means the full range of activity, from exploration through production and reclamation, associated with the location and extraction of a mineral which will cause physical damage to the surface. The term includes (i) processing and transportation of the minerals if those operations are conducted on the same surface tract from which the underlying mineral is extracted; and (ii) recovery of any mineral left in residue from previous extraction or processing operations.

(5) "Ongoing mineral development" means: (i) the continuation of any mineral development that is being conducted on or under the surface; (ii) additional mineral development that is identified in a work plan, pooling or unitization agreement, or other document, that has been approved by an agency responsible for regulating the mineral development; or in drilling or mining logs or other records maintained by a mineral

developer; or (iii) the resumption or extension of mineral development within 30 years after the previous production stopped.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(7) "Surface" means the exposed area of land, improvements on the land, subjacent and lateral support for land and structures, and any part of the underground actually used by a surface owner as an adjunct to surface use, such as root medium, groundwater, and construction footings.

(8) "Surface owner" means a person who holds an interest of record in the surface estate or a person in possession of the surface who holds an unrecorded interest in the surface estate, excluding adverse claimants without adjudicated title.

(9) Except when expressly stated otherwise, "surface use or improvement" means an existing or future surface use or improvement.

COMMENT

The definition of accommodation is drawn, in particular, from the language of the Texas Supreme Court in *Moser v. U.S. Steel*, 676 S.W.2d 99, 103 (Tex. 1984), where in the context of dealing with uranium the court refers to the doctrine as the "'due regard' or 'accommodation' doctrine". Cases that apply or further define accommodation include: *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853 (Tex. Civ. App. 1970); *Getty Oil Co. v. Royal*, 422 S.W.2d 591 (Tex. Civ. App. 1968); *Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co.*, 34 Okla. 775, 127 Pac. 252 (1912). Thus mineral owners or developers may not impair an existing surface use or improvement where technologically and economically feasible alternatives for developing the minerals are available to the mineral owner or developer. In *Getty Oil Co. v. Royal*, 422 S.W.2d 591, 592 (Tex. Civ. App. 1968), the mineral developer sued to prevent the surface owner from installing gates across roads that the mineral developer used to access three oil wells and a meter. The mineral developer had constructed the roads and used them in an open condition "for many years" before defendant acquired the tract and built a fence around it with four gates across the roads. The court upheld the

surface owner's conduct concluding that the mineral developer having to get in and out of a vehicle five times rather than once to service a well is not an unreasonable inconvenience. The surface owner had an interest in keeping out trespassers and it was proper to instruct the jury to balance the inconvenience to the mineral developer with the utility to the surface owner. Thus it is not conclusive against the surface owner if the alternative methodology costs the mineral developer more. As another illustration, a road accessing a mine site may cost more to place at the edge of a farmer's field than it would cost to run it through the middle of the field, but the added cost may have no significant effect on the overall profitability of the venture. The accommodation doctrine is a specific application of the reasonable use aspect of the surface and use access easement recognized in Section 3.

The definition of mineral does not redefine mineral for general purposes. The intent is to cover all substances subject to severance from the surface and development the way traditional minerals are developed. Sand and gravel are surface-mined much like coal. Therefore a surface owner facing sand and gravel extraction should be treated the same as a surface owner facing coal extraction. The definition here follows the definition used in the Uniform Dormant Mineral Interests Act.

The definition of surface is intended to be broad enough to include riparian rights and any other property right privileges to use land covered by water as surface. Thus the owner of a right to wharf out who builds a dock into the water has a surface improvement in the dock.

SECTION 3. EASEMENT FOR SURFACE ACCESS AND USE ACCOMMODATION.

(a) The separation of a mineral estate with a right of mineral development from the surface by deed, lease, or other instrument, in the absence of language in the instrument to the contrary, establishes the mineral estate as the dominant estate and creates an easement on and through the surface for reasonable access to the minerals in place and for reasonable use of the surface in the development of the mineral estate, as defined by other law of this State.

(b) A surface access and use easement under subsection (a) is subject only to accommodation to surface uses and improvements and enlargements or curtailments effected under Section 4, 5, 6, or 8 or by agreement.

COMMENT

Both the existence of the easement and the dominance of the mineral estate are well recognized. The North Dakota Supreme Court recently stated both:

The above cases recognize the well-settled rule that where the mineral estate is severed from the surface estate, the mineral estate is dominant. . . . The mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless. Thus, the surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate.

In the absence of other rights expressly granted or reserved, the rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are reasonably necessary to explore, develop, and transport the minerals.

Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979). Conversely, a surface owner is entitled to use the surface to the extent that the surface use is consistent with the mineral development right. See Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 855 (Tex. Civ. App. 1970).

While this Act in Section 3(a) declares the existence of the implied easement of surface access and use, it does not provide a basis for deciding whether a particular means of access or a particular use, such as a power line, surface versus underground mining, employee living quarters, and so forth, is within the scope of the easement. The Act declares only that parties may by agreement limit or enlarge the access and use and then applies the accommodation doctrine to whatever access or use is determined to be within the scope of the easement. For example, several courts have ruled that when access language in the severance document is consistent with underground mining, the mineral developer does not have a right to develop the mineral by the surface or strip mining method. See, e.g., Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974); Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970). Decisions as to what reasonable surface uses exist for the mineral developer will continue to be made under the common law of the state.

The Act creates a statutory accommodation doctrine. See Section 2(1) and the Comments thereto for definition. Section 3(b) also makes clear that the accommodation doctrine as adopted in this Act provides protection for mineral development and surface uses and improvements as effected under Section 4, 5, 6, or 8. Thus under Section 4 a mineral developer may seek to have a mineral development plan preapproved as to accommodation. Under Section 5 a surface owner may seek full protection for a specific use or improvement. Under Section 6, mineral owners or developers and surface owners

may agree as to the scope of the accommodation doctrine. Section 8 provides for court action to determine a Section 4 or Section 5 privilege.

Although the following illustrations of subsection (b)(1) refer to surface improvement, they apply as well to surface use. In each instance mining would start after the stated events.

1. O has an improvement on the surface at the time O transfers the mineral estate to X without an express waiver of liability for surface damages. Then this Act is passed. O's improvement can be protected under the accommodation doctrine as defined in this Act. Therefore, a mineral developer must proceed with due regard for the improvement if technologically sound and economically alternative methods of mineral development exist.

2. O transfers the mineral estate to X without an express waiver of liability for surface damages. Thereafter O, or a successor to the surface estate, makes an improvement on the surface. This Act is passed. The improvement can be protected under the accommodation doctrine as defined in this Act. Therefore, a mineral developer must proceed with due regard for the improvement if technologically sound and economically alternative methods of mineral development exist.

3. O transfers the mineral estate to X without an express waiver of liability for surface damages. This Act is passed. O, or a successor to the surface estate, makes an improvement on the surface. The improvement can be protected under the accommodation doctrine as defined in this Act. Therefore, a mineral developer must proceed with due regard for the improvement if technologically sound and economically alternative methods of mineral development exist.

The accommodation doctrine as defined allows some injury to or interference with a surface improvement or use. However, a surface owner with an improvement as noted in illustrations (1) to (3) may also obtain a right to the damages allowed under Section 10 for any interference with or injury to the improvement from mineral development by qualifying the improvement or use under Section 5.

If in either of illustration 1, 2, or 3, there is an express waiver of liability for surface damages given before the passage of this Act, the accommodation doctrine as adopted by this Act applies only to the extent application is not inconsistent with the waiver. See Section 6.

SECTION 4. PROTECTION OF MINERAL DEVELOPMENT. If a mineral developer gives each surface owner notice of proposed mineral development, together with a plan to accommodate existing surface uses or improvements protected by Section

3(b) or a plan satisfying requirements for a permit under federal or state law, the mineral developer is not liable for failure to accommodate surface uses or improvements affected by the proposed plan unless (i) a surface owner serves on the mineral developer a written objection to the plan within 60 days after receipt of notice, challenges the plan by a proceeding under Section 8 and obtains a favorable determination in the proceeding, or (ii) the mineral developer makes material deviations from the plan which result in material injury to surface uses or improvements entitled to protection under the accommodation doctrine.

COMMENT

Under the implied right to make a reasonable use of the surface, the courts held that the mineral developer was not liable for damages when the mineral developer was making a reasonable use of the surface. See *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 854-55 (Tex. Civ. App. 1970). Thus under the accommodation doctrine which grows out of the reasonable use limitation, the mineral developer is not liable to the surface owner for damages that result when there is no violation of the doctrine.

It was possible under the common law for a mineral developer to get a pre-mining determination of reasonable use and to enjoin a surface owner from interfering with the reasonable use. See, e.g., *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979). This section specifically allows the mineral developer to obtain a determination that its mineral development will be consistent with the accommodation doctrine. If the mineral developer obtains the determination and conforms its operation to the plan so approved, it will be insulated from liability under this Act for violation of the accommodation doctrine. See Section 8(d).

Section 7 provides the form for any notice or objection to be given under this Act. If a notice or objection does not conform substantially to that form it does not constitute notice or objection under this Act. Additionally, under Section 9 the notice or objection must be recorded. Notices provided to surface owners by mineral developers as a result of the requirements of other statutes, for example SMCRA, do not trigger this section. The only interrelationship between this section and other statutes is that the mineral developer may use plans developed under the other statutes to meet the informational aspects of this section when the mineral developer chooses to invoke this section.

Sections 4 and 5 necessarily are mutually exclusive to the extent that one or the other is exercised.

SECTION 5. PROTECTION OF SURFACE USE OR IMPROVEMENT.

(a) A surface owner who desires protection for a proposed surface use or improvement may give the mineral developer notice of the use or improvement. The mineral developer is subject to a claim for damages for any injury that subsequent mineral development causes to the use or improvement unless there is ongoing mineral development or the mineral developer makes a written objection to the proposed use or improvement to the surface owner within 60 days after receipt of the notice.

(b) If the mineral developer makes a written objection on the surface owner pursuant to subsection (a), the surface owner may gain protection for the proposed use or improvement only by (i) entering into an agreement with the mineral developer, or (ii) obtaining a determination in a proceeding under Section 8 that there is no probability of future mineral development or that technologically sound and economically practicable mineral development can be conducted without material injury to the surface use or improvement.

COMMENT

Under the implied right to make a reasonable use of the surface, the courts held that the mineral developer was not liable for damages when the mineral developer was making a reasonable use of the surface. See *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 854-55 (Tex. Civ. App. 1970). Thus under the accommodation doctrine which grows out of the reasonable use limitation, the mineral developer is not liable to the surface owner for damages that result when there is no violation of the doctrine. However, it is this very right to use the surface without payment for surface damage that can impede surface development.

This section allows a surface owner to seek full protection for a use or improvement except when there is ongoing mineral development. Section 7 provides the form for any notice or objection to be given under this Act. If a notice or objection does not conform substantially to that form it does not constitute notice or objection under this Act. Additionally, under Section 9 the notice or objection must be recorded. If a surface owner successfully pursues protection under this section, the surface owner will be entitled to the damages as measured in Section 10 for any injury to a protected surface

use or improvement even if the injury would not have been recognized as a violation of the accommodation doctrine. See Section 8(c).

This section is not available to a surface owner during a period of ongoing mineral development. The notion is that once mining has started, the surface owner should not be able to change the rules while that mining is ongoing. This applies also to mining that has been identified in the type of plans noted in the definition before the surface owner invokes this section. The key however is not the continuation of mineral development but rather the continuation of the existing mineral development or that identified in the plan. Obviously the surface owner needs to be on notice of the plan for it to enter into the surface owner's consideration in invoking this section.

If the surface owner does not pursue protection under this section at the time that the opportunity to do so first arises, the surface owner risks losing the lack of probability of future mineral development as a ground for protecting the surface use improvement. This is because under Section 8 probability is determined only as of the time of the proceeding and not as of the time of the inception of the surface use or improvement.

Sections 4 and 5 necessarily are mutually exclusive to the extent that one or the other is exercised.

SECTION 6. MODIFICATIONS OF EASEMENT FOR SURFACE ACCESS

AND USE. An easement for surface access and use and the obligation to accommodate are subject to (i) any provision of a deed, lease, or other instrument which expressly requires payment of surface damages, or waives surface damages, or protects surface improvements constructed before or after severance occurs or the obligation to accommodate arises; and (ii) any agreement relating to surface use or improvement or damages.

COMMENT

In Section 6(i) the Act recognizes expansion of or limitations on the surface access and use easement and on the accommodation doctrine contained in past or future deeds, leases, or similar documents if the expansion or limitation is express. Thus, for example, broad form mineral deeds and reservations do not waive damages unless damages are expressly waived in addition to the broad form rights of access and use. Otherwise this section does not declare the validity of these expansions or limitations but assumes that they are valid under contract and property principles. If invalid, they would have no relevance to this Act. In Section 6(ii) the Act recognizes that the mineral owner

or mineral developer and surface owner may come to an agreement on how to carry out the rights and obligations of this Act.

Although the exceptions in Section 6 are recognized by the Act and can serve to limit the scope of the Act, the exceptions are otherwise extraneous to the Act. Any remedies for their violation would be through proceedings pursued separate and apart from proceedings specified in this Act.

This section does not abrogate any duty imposed by any other statute of the state.

SECTION 7. PROCEDURES FOR NOTICE AND OBJECTION. A notice or objection to a surface owner or mineral developer is sufficient if it is in writing and delivered with a return of service or mailed with return receipt requested. The notice must state the time for objection and the address to which an objection in writing may be mailed or delivered. The notice must be accompanied by a description of the mineral development or the surface use or improvement and a copy of this [Act].

COMMENT

A failure to conform substantially to the notice or objection procedure or form contained in this section would render the notice or objection ineffective under this Act. No other remedy for notice failure is provided in this Act.

SECTION 8. DETERMINATION WHETHER ACCOMMODATION IS REQUIRED.

(a) If the surface owner and mineral developer are unable to reach an agreement under Section 4 or 5, either party may institute an appropriate proceeding.

(b) If it is determined in the proceeding that (i) mineral development in the foreseeable future is probable based upon reasonably foreseeable economic conditions and technology and that technologically sound and economically practicable mineral development cannot be conducted without material injury to the surface use or

improvement, or (ii) that the proposed surface use or improvement would interfere materially with technologically sound and economically practicable mineral development, the mineral developer may exercise the development easement appurtenant to the mineral estate without accommodation for the proposed surface use or improvement and is not liable under this [Act] for damages to the proposed use or improvement.

(c) If it is determined in the proceeding that (i) there is no probability of mineral development in the foreseeable future, based upon reasonably foreseeable economic conditions and technology, or (ii) the proposed surface use or improvement would not interfere materially with technologically sound and economically practicable mineral development, the mineral developer may exercise the development easement appurtenant to the mineral estate only with accommodation for the proposed surface use or improvement and is liable under this [Act] for damages to that use or improvement. If the determination under this subsection authorizes a new use or improvement, and the surface owner does not begin the proposed use or construction of the proposed improvement within three years after the determination, the mineral developer is thereafter relieved from the obligation to accommodate the proposed surface use and improvement and is not liable under this [Act] for damages to the proposed use or improvement.

(d) The issues specified in subsections (b) and (c) are the sole substantive issues for determination in the proceeding. A court may not enjoin mineral development or surface use or improvement under this [Act].

(e) The court shall award to the prevailing party reasonable attorney's fees and other expenses incidental to the proceeding.

COMMENT

What constitutes an appropriate proceeding will depend on the law of the state. For example, it might be a declaratory judgment proceeding, a civil proceeding, or a proceeding in arbitration.

When a specific approved use is not instituted within three years, the mineral developer is absolved from accommodating that use under this Act; however, the developer is not absolved from accommodating any existing uses that are ongoing. Those uses simply do not have the additional protection accorded under Section 5.

However, if the use or improvement is instituted, the duty to accommodate will extend to the life of the use or improvement unless provided otherwise in the decree of the decision-maker under this section. A mineral developer could seek equitable relief on the basis that the life of the use or improvement is over.

The limits in this Act on injunctive relief apply only to claims provided for by this Act. Therefore, injunctive relief as available in equity for actions outside this Act is not affected by the Act. Similarly injunctive relief provided for in other statutes that apply to mineral development is not affected by this Act. See Section 11.

While a surface owner may abandon an approved use and seek approval of a different use, after several abandonments and approvals of different uses, a court may want to be sure that the surface owner is pursuing bona fide plans rather than simply instituting actions to harass the mineral owner or developer.

SECTION 9. RECORDATION.

(a) The written notice and written objection required by Sections 4 and 5 must be recorded in each county in which the affected land is located.

(b) A deed, lease, instrument, agreement under Section 6, or a determination under Section 8, may be recorded in each county in which the affected land is located.

SECTION 10. MEASURE OF DAMAGES FOR FAILURE TO ACCOMMODATE - LIMITATIONS.

(a) If a mineral developer fails to accommodate a surface use or improvement protected under this [Act], the surface owner may maintain a civil action to recover damages for:

(1) loss of surface use limited to the greater of (i) loss of income for any interrupted period of use of the surface or improvements under the accommodation doctrine, or (ii) loss of value of the use of the surface or improvements during any period of interrupted use; and

(2) injury to or destruction of surface improvements limited to the lesser of (i) the loss of fair market value of the improvement, or (ii) the cost of repairing, relocating, or replacing the improvements.

(b) A mineral developer may offset the value of any required reclamation activity or any benefits conferred on the property as a result of mineral development against the amount of aggregate damages for loss of surface use and destruction of or injury to surface improvements.

(c) An action to recover damages under this section may not be commenced more than two years after the loss is or should have been discovered by the surface owner, but the parties by agreement may modify or waive the period of limitation.

COMMENT

This section applies only to damages awarded under this Act. See Section 11.

In subsection (b) royalty received by the surface owner would not be a benefit received; however, a royalty agreement may be entered into as a method of compensating for damages and if the agreement so specifies will be an agreement under Section 6(ii). An improved access road for the surface owner would be an example of a type of benefit that might be conferred by the mineral development.

SECTION 11. RIGHTS PRESERVED. Except as specifically modified by this [Act], this [Act] does not limit liability of the surface owner under other law for impairment or obstruction of mineral development or correlative remedies of the mineral developer, or liability of the mineral developer under other law for unreasonable or excessive use of the surface or correlative remedies of the surface owner.

COMMENT

In *Heikkila v. Carver*, 416 N.W.2d 593, 596 (S.D. 1987), the court summarized the possible bases for surface owner damage actions:

Moreover, apart from liability based on either a surface damage clause or the theory of unreasonable surface use, liability can also be based on theories of tort law or breach of statutory duties.

"Where liability is found to exist based on negligence, the remedy is compensatory damages. Additionally, in cases of wanton disregard of the interests of the surface owner, punitive damages may be awarded." *Turner v. Kaufman*, 237 Kan. 184, 699 P.2d 435, 439 (1985). All causes of action available at common law, whether based on obstruction, excessive or unreasonable use, negligence, nuisance, malicious or intentional misuse, contract, other recognized grounds and all causes of action conferred by other statutory law are preserved.

The limits in this Act on injunctive relief apply only to claims provided for by this Act. Therefore, injunctive relief as available in equity for actions outside this Act is not affected by the Act. Similarly injunctive relief provided for in other statutes that apply to mineral development is not affected by this Act. See Section 11.

This Act does not limit duties placed on mineral developers under other statutes as, for example, SMCRA and Oil and Gas Conservation Acts.

SECTION 12. SHORT TITLE. This [Act] may be cited as the Model Surface Use and Mineral Development Accommodation Act.

SECTION 13. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is invalid, the invalidity does not affect any other provision or application of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14. EFFECTIVE DATE. This [Act] takes effect

SECTION 15. REPEALS. The following acts and parts of acts are amended or repealed:

- (1)
- (2)
- (3)